No. 8378

# In the United States Circuit Court of Appeals

## For the Ninth Circuit

THE EAGLE, STAR AND BRITISH DOMINIONS, a British Corporation,

Complainant,

vs.

M. G. TADLOCK, SECURITY TRUST & SAVINGS BANK OF SAN DIEGO, a Corporation, MATT J. WALSH and FRANK E. GARBUTT, doing business under the firm name and style of GARBUTT-WALSH, a co-partnership, J. J. CAMILLO, HARBOR BOAT BUILDING COMPANY, a corporation, DAVID C. CAMPBELL and GEORGE E. CAMPBELL, doing business under the firm name and style of THE CAMPBELL MACHINE CO., a Corporation,

Defendants,

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MATT J. WALSH and FRANK E. GARBUTT, doing business under the firm name and style of GARBUTT-WALSH,

Cross-Complainants,

vs.

M. G. TADLOCK, SECURITY TRUST & SAVINGS BANK OF SAN DIEGO, a Corporation, J. J. CAMILLO, HARBOR BOAT BUILDING COMPANY, a Corporation, DAVID C. CAMPBELL and GEORGE E. CAMPBELL, doing business under the firm name and style of THE CAMPBELL MACHINE CO., a Co-partnership,

Cross-Respondents.

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SECURITY TRUST & SAVINGS BANK OF SAN DIEGO, a Corporation, and M. G. TADLOCK,

Appellants.

vs.

MATT J. WALSH and FRANK E. GARBUTT, doing business under the firm name and style of GARBUTT-WALSH,

Appellees.

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# Appellants' Reply Brief

**Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.**


NAMES AND ADDRESSES OF SOLICITORS

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## TOPICAL INDEX


| | Page |
|---|---|
| Statement of the Case | 2 |
| Appellants' Position | 2 |
| Appellees' Brief Presents Two Points | 3 |
| Appellants' Reply to First Point | 3 |
| Appellees' Second Point Answered | 5 |

## AUTHORITIES CITED


Page

Chafee—"The Federal Interpleader Act of 1936"—45 Yale Law Journal, 1167 .......... 9

Constitution of the United States, Art. 3, Sec. 2. cl. 1.......... 9

Opinion, Judge Leon R. Yankwich, 14 Fed. Supp., 934.......... 6

Penn Mut. L. Ins. Co. vs. McGuire (1936) 13 Fed. Supp., 967 .......... 7, 8

Sanders vs. Armour Fertilizer Works, 292 U. S., 190, 191; 54 S. Ct., 677; 78 L. ed., 1206; 91 A. L. R., 950.......... 8

Turman Oil Co. vs. Lathrop (1934) 8 Fed. Supp., 870.......... 7, 8

U. S. C. A. Title 28, Sec. 41, Subd. 1.......... 8, 9

U. S. C. A. Title 28, Sec. 41, Subd. 26.......... 7, 8

U. S. C. A. Title 46, Sec. 911 .......... 5

U. S. C. A. Title 46, Sec. 973 (Sec. 30, Subsec. R. 41 Stat. 1005) .......... 5

Yankwich, Dist. Judge Leon R., Opinion .......... 6

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Appellees.

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# Appellants' Reply Brief

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TO THE HONORABLE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT.

The Appellees, having served upon the Appellants a written reply or brief to the Opening Brief of Appellants in the above entitled cause, Appellants present for the consideration of the Court the following Reply:

## STATEMENT OF THE CASE.

We have made an examination of the facts set forth in Appellees' Reply Brief under the heading of "Statement of the Case" and are at a loss to discover wherein Appellants have failed in our Opening Brief to present a statement of the case so as to correctly show all facts for the consideration of the Court and to point out just how the questions which are to be considered by this reviewing Court arose in the court below. Perhaps we have erred in some minor matter and, if so, we urge that it was done through inadvertence and not with any intention of misleading anyone. We have no dispute with either set of facts as set forth in either of the briefs heretofore filed.

## APPELLANTS' POSITION.

On page 11 of Appellees' Brief appears the statement that the errors of law of appellants are vague in general and it is impossible to determine which of the assignments are relied upon in the Specification of Errors appearing in Appellants' Brief. We do not believe this Honorable Court will have any difficulty in ascertaining from the Specification of Errors heretofore set forth in Appellants' Opening Brief at page 7, as to just what assignments of error are relied upon by appellants in this case.

We are sorry that counsel for Appellees has failed to answer the major portion of the argument set forth in our Opening Brief. It leaves both the Court and Counsel for Appellants without much help in determining the questions involved in this appeal. If we understand the Reply Brief

correctly, counsel for Appellees presents an argument upon simply two points, as follows:

## APPELLEES' BRIEF PRESENTS TWO POINTS.

First: That the Lower Court did not err in denying our motion to set aside the default and reopen the case because Appellants had failed to present in their sworn Answers, filed too late, a meritorious defense to the allegations of the Crossbill.

Second: That the Court had jurisdiction of this Complaint in Interpleader and that the general equitable powers of the Court were sufficient to enable it to determine a controversy existing between the defendants, who were all residents of the State of California.

## APPELLANTS' REPLY TO FIRST POINT.

As to the first point made by counsel for Appellees, we respectfully submit the following:

Under the Assignments of Error made by Appellants (as disclosed by the Transcript, pp. 187-189, incl.) we set forth four assignments of error, all of which are repeated in our Specification of Errors (Page 7, Opening Brief), although some are given as reasons why the Court erred in denying our motion and in rendering a decree in favor of Appellees.

We endeavor to make clear in our opening brief that no one reason assigned by us—with the exception perhaps of the one as to the jurisdiction of the Court to consider the controversy—would alone justify the Appellate Court in concluding that the lower court erred in denying our Motion, and we tried to explain that because of all of the reasons assigned, the circumstances were such as would justify the

conclusion that the lower Court erred in an abuse of discretion.

Counsel, therefore, must have failed to understand our position, because he endeavors to argue in his Brief (page 11) that the Appellate Court should not consider it sufficient to reverse the lower court's order because of the unfamiliarity of counsel with Federal practice! Counsel then justifies the Court's action by quoting at length from testimony which is not taken from the Transcript of Record, but from that which is referred to as "Rep. Tr." which we take to mean Reporter's Transcript. We have no access to this record and are not in any position to comment one way or the other upon this evidence. Further, we have not made any point that the Court below was not justified from the evidence which he heard in reaching the conclusion that the Appellees were entitled to a decree. The appellants were given no opportunity in the court below of producing any evidence and the Court only heard one side of the case. We are urging that the court below should have taken into consideration upon our Motion to set aside the default the sworn Answers of these two appellants, in which there were presented meritorious defenses on behalf of both appellants to the cause of action set forth in the Cross-Bill, and in our Opening Brief, we set forth at length our reasons why we were of the opinion that these answers did present meritorious defenses.

Of these reasons, counsel for Appellees discusses but one, and that concerns the position we took with respect to the lack of authority of the owner of the boat "Yellowtail" to incur obligations resulting in the creation of a maritime lien

and the knowledge of the Appellees Garbutt and Walsh that such owner was without authority to create such lien.

Counsel's position, if we understand it correctly, is that the appellant bank had no preferred mortgage under the Ship Mortgage Act (46 U.S.C.A., Sec. 911) and that, therefore, the existence of the mortgage in this case did not prevent the creation of a maritime lien. We concede both these facts, but we insist, under Section 973 of the United States Code, Title 46 (Sec. 30, sub-Sec. R—41 Stat. 1005) that in California the owner of a boat who has mortgaged the same cannot create a lien upon such boat in favor of a creditor who has knowledge of the existence of such mortgage, or who, by the exercise of reasonable diligence, could have ascertained the existence of such mortgage.

We also contend that in the instant case the sworn Answers of the appellants presented to the trial court, allege that the Appellees Garbutt and Walsh knew of such mortgage and that the owner of the boat, Tadlock, had no authority to order supplies and repairs for the said boat without the consent of the Bank, and that the Bank did not give such consent. We do not believe that this position has been answered by counsel for the Appellees in his brief.

## APPELLEES' SECOND POINT ANSWERED.

We now come to consider the argument set forth on page 26 of Appellees' Brief with respect to the jurisdiction of the Court to issue a Decree in favor of Garbutt and Walsh, appellees herein, because of a lack of diversity of citizenship between appellees Garbutt and Walsh and Appellants Tadlock and the Bank.

An analysis of the argument made by counsel on pages 26 to 36 of Appellees' Brief indicates that counsel now takes a position diametrically opposed to that which he took in the proceedings in the court below, and that argument advanced by counsel for appellees in this brief was fully considered by Judge Yankwich and passed upon in the proceedings below, as is indicated by his written Opinion quoted in our Opening Brief.

Notwithstanding counsel's conclusion, as set forth on page 27 of his brief—that "an examination of the entire opinion and authorities cited indicates that the holding is based wholly on the alleged failure to establish jurisdiction under the federal statute," Judge Yankwich did consider the question as to whether or not he could uphold his jurisdiction upon the general equitable grounds of interpleader and, in support of this, we direct this reviewing Court's attention to the language of Judge Yankwich which appears on page 54 of our Opening Brief, as follows:

> "An interpretation which would, as the statute stands now, allow one form of interpleader under general equity principles based upon diversity of citizenship as between the plaintiff and the defendant, and another form under the statute, in cases involving diversity of citizenship as between plaintiffs and defendants with the jurisdictional minimum of $3000.00, and another, dependent upon diversity of citizenship between claimants, with a jurisdictional minimum of $500.00. I cannot conceive that the Congress by enlarging the interpleader statute, has sought to create such a situation. Rather do I believe that they intended to cover the entire field by broadening the scope of what had previously been a limited enactment. So doing they viewed the citizenship or alienage of the stakeholder as entirely imma-

terial, and his interest in the controversy as that of a nominal party only (*See Von Herberg vs. City of Seattle* (C. C. A. 9 1926) 27 Fed (2) 547) grounded jurisdiction upon diversity of citizenship of the real parties in interest,—the claimants. The only important function of the court in interpleader is the settlement of controversies to the fund in its hands. If the diversity of citizenship of the claimants be disregarded, we would find the District Court, after the deposit of the money, settling controversies between citizens of the same state, —a jurisdiction which it does not and cannot constitutionally have. (*Constitution of the United States, Article 3, Section 2, Clause 1.*)"

We are satisfied that this opinion of Judge Yankwich answers completely the argument made by counsel in his Brief. The authorities therein set forth are reviewed by Judge Yankwich and, in spite of them, as pointed out by Judge Yankwich, a study of the question leads one irresistibly to the conclusion that an interpleader cannot be had in Federal courts without the existence of *a controversy between citizens of different states.*

We are able to find but two cases which seem to support counsel's position. These are *Penn Mut. L. Ins. Co. vs. McGuire* (1936) 13 Fed. Supp., 967 cited on page 29 of counsel's brief, and *Turman Oil Company vs. Lathrop* (1934) 8 Fed. Supp., 870, cited on page 27 of Counsel's brief.

The latter case (Turman Oil Company) is readily distinguished, because, as the Court points out in that case, there existed an actual controversy between the interpleader and the defendants, and no controversy existed between the defendants themselves. Both under general equitable principles and under the Congressional Interpleader Act (U. S.

C. A. Title 28, Sec. 41, Subdiv. 26), one of the essential elements of interpleader is the existence of a stakeholder having in his possession money or property in which he, the stakeholder, claims no interest. If the stakeholder does claim an interest or has an adverse position toward such or toward a claimant of the fund, the interpleader will not lie and there exists simply a cause of action between different persons governed, so far as the jurisdiction is concerned, by Subdivision 1 of Section 41, Title 28 U. S. C. A.

Therefore, in the Turman Oil Comuany case, the action, though called "interpleader", was not an interpleader at all, but a suit between the Oil Company and two defendants.

On the other hand, the Penn Mut. L. Ins. Co. case, cited above, cannot be so distinguished, because in that case it shows clearly that a diversity of citizenship existed between the interpleader and defendants who were residents of the same state, while the controversy existed between the defendants who were residents of the same state. The Court does hold that "where the citizenship of the interpleader is in one state and the claimants in another, the Federal Court has jurisdiction" and cites in support thereof *Sanders vs. Armour Fertilizer Works,* 292 U. S., 190, 191, 54 S. Ct., 677, 78 L. Ed., 1206, 91 A. L. R., 950.

An examination of the Armour Fertilizer Works case shows that the decision does not support this conclusion reached by the Court in the Penn Mutual Life Insurance case because the United States Supreme Court does not reach any such conclusion at all. In the Armour Fertilizer Works case, the interpleader was filed against defendants who were residents of different states—namely: W. D.

Sanders, a resident of Texas, and the Armour Fertilizer Works, a corporation of the State of Illinois, while the interpleader plaintiffs are corporations of Connecticut, and the decision is based entirely upon the Act of Congress of May 8, 1926, authorizing Federal interpleaders.

Counsel also quotes at length in his brief from an article entitled "The Federal Interpleader Act of 1936" written by Professor Chafee in 45 Yale Law Journal, at page 1167. Professor Chafee concludes that notwithstanding the Act of 1936 authorizing Federal interpleaders, it is entirely conceivable that a Federal interpleader may lie apart from the statute under the general equity powers of the District Courts under subsection 1 of the same section of the Judicial Code (28 U. S. C. A. Sec. 41, (1) (1926)), if the amount in controversy be over $3000.00.

If Professor Chafee means what his language indicates, we believe he is wrong, because under the Constitution of the United States, Article 3, Sec. 2, Clause 1, a Federal District Court cannot settle controversies between citizens of the same state, and where a stakeholder holds money to which others have a claim and the stakeholder has no interest whatever in the matter except to pay it to the one rightfully entitled to it, there does not exist a controversy between the stakeholder and the claimants.

In our case, The Eagle, Star and British Dominions admitted full liability under the insurance policy and neither Garbutt and Walsh nor the Bank or Tadlock had any controversy whatever with this insurance company. The controversy existed between Garbutt and Walsh on the one side and the Bank and Tadlock on the other. The insurance com-

pany, therefore was but a nominal party with no interest whatever in the result of the litigation.

We are satisfied, therefore, that the District Court had no jurisdiction to determine the controversy existing between Garbutt and Walsh and the Bank and Tadlock, simply because the insurance company—who admitted its full liability under the insurance policy—was a resident corporation of Great Britain.

We therefore respectfully ask the Court to reverse the two Decrees of the Court below, namely: the Decree Pro Confesso, entered June 12, 1936 and the Final Decree in favor of Garbutt and Walsh entered June 12, 1936.

Respectfully submitted,

LINDLEY & HIGGINS,
J. F. DUPAUL,
*Solicitors for Appellants.*